Nos. 14-71004, 14-71202, and 14-70771

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Ralphs Grocery Company,

Petitioner,

V.

National Labor Relations Board,

Respondent.

Petition for Review of a Decision and Order
of the National Labor Relations Board
Case Nos. 31-CA-27160, 31-CA-27475, and 31-CA-27685

Declaration of Timothy F. Ryan in Support of Ralphs' Motion to Exceed the Page Limit

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Attorneys for Petitioner,
Ralphs Grocery Company

I, Timothy F. Ryan declare:

1. I am an attorney duly admitted to practice law in the State of California and before the United States Court of Appeals for the Ninth Circuit. I am Senior Counsel at Morrison & Foerster LLP and lead counsel for respondent Ralphs Grocery Company. If called to testify, I would state the following based on my own personal knowledge:

2. On August 17, 2016 the Court ordered the parties to submit three-page letter briefs addressing the holding of *Consumer Financial Protection Bureau v. Gordon*, 819 F.3d 1179 (9th Cir. 2016).

3. Ralphs originally submitted a three page letter brief on September 16, 2016. A true and correct copy of the original letter brief is attached as Exhibit A.

4. The font size of the text of Ralphs' original letter brief was 12 points in the body of the letter and 10 points in the footnotes, the default settings for drafting documents in Microsoft Word.

5. Ralphs' brief was rejected by the Clerk of Court for failure to comply with Federal Rule of Appellate Procedure (FRAP) 32 and Ninth Circuit Rule (NCR) 32-3. A true and correct copy of the Clerk's e-mail message with instructions for resubmission is attached as Exhibit B.

6. The Clerk's instructions provided that the brief may not be altered except in the manner directed by the Clerk, which does not include substantive changes.

7. FRAP 32 and NCR 32-3 do not appear to apply to letter briefs because several of their requirements conflict with common conventions for formatting letters.

8. In order to comply with the Clerk's instructions, Ralphs' must reformat the brief in a manner that will cause it to exceed three pages in length. Ralphs' reformatted brief contains 1,361 words and is 4 pages in length.

9. The issues presented by the Court's request to address *Gordon* are complex. More than three pages are required in order to explain the possible need for reconsideration of *Gordon*'s holding and to distinguish the facts or *Gordon* from the facts of this case.

10. The present length of the letter reflects diligent efforts by counsel for Ralphs to reduce its length as much as possible while addressing the key issues presented by *Gordon*. Further reductions will require that Ralphs sacrifice arguments that deserve the Court's consideration.

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed September 19, 2016 in Los Angeles, California.

/s/ Timothy F. Ryan.

Exhibit A

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September 16, 2016

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For Filing Via ECF System

Molly C. Dwyer, Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh St.
San Francisco, CA 94103

Re: *Ralphs Grocery Company v. National Labor Relations Board*,
Appellate Case Nos. 14-70771, 14-71004 and 14-71202
Oral Argument Held 2/10/2016

Dear Ms. Dwyer:

We write on behalf of Ralphs Grocery Company in response to the Court's order dated August 17, 2016 directing the parties to file letter briefs addressing the holding in *Consumer Financial Protection Bureau v. Gordon*, 819 F.3d 1179 (9th Cir. 2016). In that case, the court held that a valid appointee could ratify the acts of an invalid predecessor. *Id.* at 1190-92. Though *Gordon* articulated the proper test for ratification, its application was flawed. Proper application to *this* case demonstrates that not only was there no act of affirmance constituting ratification, but ratification is not possible. The Federal Vacancies Reform Act makes clear that an invalid appointee's acts cannot be ratified. 5 U.S.C. § 3348(d)(2).

In *Gordon*, the Ninth Circuit adopted a test first endorsed by the Supreme Court in *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994). *Gordon*, 819 F.3d at1191. Under that test, "it is essential that the party ratifying should be able … to do the act ratified at the time the act was done." 513 U.S. at 98 (quoting *Cook v. Tullis*, 85 U.S. 332, 338 (1874)). As noted in *Gordon*, this test is derived from the Restatement (Second) of Agency, which states:

> (1) An act which, when done, could have been authorized by a purported principal, or if an act of service by an intended principal, can be ratified if, at the time of affirmance, he could authorize such an act.

819 F.3d at 1191; Restatement (Second) of Agency § 84 (1958).[1] As such, ratification

[1] *Gordon* also makes reference to a different test, enunciated in the Restatement (Third) of Agency, which requires only existence, not authority, at the time the act was done. 819 F.3d at 1191. By finding it necessary to assert that the CFPB did have authority, the decision implicitly rejected that test. *Id* at 1192.

requires three elements: (1) the principal's authority and ability to act *at the time the act was done*, (2) the principal's authority and ability to act at the time of affirmance, and (3) some act of affirmance.[2]

Though *Gordon* identified the proper test, its application of this test is incongruous with the test's language and contrary to both the common law and the United States Code. The court paid short shrift to its analysis of the first prong, whether the CFPB had the authority and ability at the time the act was done, and conflated standing with ratification. 819 F.3d at 1192. Moreover, the court did not consider applying the Federal Vacancies Reform Act (FVRA), which it mentions only in a citation. *Id.* at 1191.

The test articulated by the Supreme Court in *Victory Fund* requires that the party "*be able... to do the act... at the time the act was done*." 513 U.S. at 98 (emphasis added). *Gordon* ignores the simple reality that a vacant office has no ability to act and an invalidly appointed officer has no authority. In reasoning that the CFPB did have authority at the time the act was done, the *Gordon* court conducted virtually no substantive analysis, citing to its own previous discussion of standing that, in turn, cited only to the statute generally empowering the CFPB to bring actions in federal court. 819 F.3d at 1192. While it makes sense that that should be the extent of the inquiry into the agency's standing, it does not follow that the same should be true for determining whether the Director's office had authority to act even though its occupant was invalidly appointed. The error is more evident upon comprehensive review of the Restatement, which *Gordon* fails to quote fully and which goes on to state:

> (2) *An act which, when done, the purported or intended principal could not have authorized, he cannot ratify*, except an act affirmed by a legal representative whose appointment relates back to or before the time of such act.

Restatement (Second) of Agency § 84 (emphasis added). Because the Director was invalidly appointed at the time, he could not have ratified his own actions then and cannot do so now.

Most problematic, however, is that the *Gordon* court ignored the FVRA, which, though partially inapplicable to the NLRB, is fully applicable to the CFPB. That act states unequivocally that an action taken by an invalid appointee shall have no force or effect and

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[2] *Gordon* also held that a public release expressly ratifying all acts done during the period of invalidity was sufficient affirmance. 819 F.3d at 1191. This holding is not relevant here because the NLRB did not release a blanket ratification of prior board decisions. Even so, the law cited in *Gordon* is unsupportive. In *Legi-tech*, the Third Circuit only held that it could not inquire whether the ratification was merely a rubberstamp because the court had no authority to review the FEC's decision to institute suit absent allegations of bias. *Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996). Subsequent opinions have found ratification appropriate only after detached and considered judgment. *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213 (D.C. Cir. 1998); *Advanced Disposal Servs. E., Inc. v. N.L.R.B.*, 820 F.3d 592, 603 (3d Cir. 2016).

may not be ratified. 5 U.S.C. § 3348(d)(2). In light of the FVRA, the application of *Victory Fund* was not only erroneous under the very terms of the test, but it was superseded.[3]

Just as the *Gordon* court should have applied the FVRA, instead of the *Victory Fund* test, and held that the actions of the invalidly filled office cannot be ratified, so too should this Court apply the FVRA here. Though the FVRA does exclude the Board from some of its provisions, its language only exempts individual "member" positions from the Act's provisions on filling vacancies. 5 U.S.C. § 3349c. The FVRA's anti-ratification provisions do not target *members* of the Board, but rather the Board itself. Therefore, the FVRA's anti-ratification provision—which does nothing more than ensure correct application of the common law rule—still applies.

Even assuming the FVRA does not apply, taking the *Victory Fund* test on its own terms, the NLRB failed to ratify reopening of this matter for two reasons: (1) the invalidly constituted Board did not have the authority or ability to act at the time and (2) a subsequent, fully constituted Board has not affirmed the act at issue here. That a panel of less than three members of the board cannot act on the Board's behalf is well settled. *New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674 (2010) ("Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board quorum of three, must be given practical effect."). Moreover, the NLRB has not issued a blanket ratification of its prior decisions as did the CFPB in *Gordon*. Finally, though the Board's March 13, 2014 Supplemental Decision and Order discusses the procedural history of the case, it does not explicitly ratify the reopening nor does it express any opinion regarding reopening.[4]

In short, the FVRA applies and precludes ratification. In the alternative, ratification is not possible because the Board was not "able to do the act … at the time the act was done," and, even if it could, the Board has not affirmed its defunct predecessor's acts.

Respectfully Submitted,

Timothy F. Ryan

[3] This error is compounded by the well-known fact that the Senate's refusal to confirm these individuals and its avoidance of a full recess were deliberately intended to prevent Executive Branch action. Permitting ratification under these circumstances enables the president to flout the will of the Senate and renders *Noel Canning* a virtual nullity. *See N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550 (2014).

[4] This case differs from the implicit ratification found in *Doolin*, where the Director's consideration of the merits necessarily amounted to a detached and considered judgment of the validity of the charges, because finding a violation on the merits necessarily entails that the initial charges were valid. 139 F.3d at 214. Here, however, the decision to reopen does not entail the same considerations as the underlying merits question.

Exhibit B

From: U.S. Court of Appeals for the Ninth Circuit, CM/ECF Help Desk
[mailto:cmecf_ca9help@ca9.uscourts.gov]
Sent: Friday, September 16, 2016 3:26 PM
To: Ryan, Timothy F.
Cc: Samaniego, Louise; Docket-LA; tim-ryan-9778@ecf.pacerpro.com; louise-samaniego-2072@ecf.pacerpro.com
Subject: ACTION REQUIRED: Deficient Filing in case 14-70771 United Food & Commercial etc v. NLRB [ID: ##223152##]

Hello,

You entered a filing in case 14-70771 United Food & Commercial etc v. NLRB:

09/16/2016 66 Submitted (ECF) Letter Brief for review. Submitted by Petitioner Ralphs Grocery Company in 14-71004. Date of service: 09/16/2016. [10126602] [14-71004, 14-70771, 14-71202] (Ryan, Timothy) [Entered: 09/16/2016 02:23 PM]

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For example: s/ Your Name
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9th Circuit Case Number(s) 14-71004, 14-70771, 14-71202

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Sep 19, 2016 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Timothy F. Ryan

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